Supreme Court, U.S.
FILED
061074 JAN 3 0 2007
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

RUSSELL P. BUTLER,

Petitioner,

v.

UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CRIMINAL ACTION NO. H-04-25 (S-2),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CRIME VICTIMS LEGAL ASSISTANCE PROJECT
STEVE TWIST*
KELI LUTHER
Post Office Box 877906
Tempe, AZ 85287
(480) 965-5640

Counsel for Petitioner

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Fifth Circuit's application of the abatement doctrine in *USA v. Kenneth L. Lay* which conflicts squarely with decisions of other circuits and state courts violate national policy codified in the Mandatory Victims Restitution Act and the Crime Victims Rights Act by unfairly denying the crime victim's right to restitution and unjustly enriching the Lay Estate?

2. Does the Fifth Circuit's holding invalidating numerous provisions of the federal Crime Victims Rights Act except for provisions applying to "convicted" defendants amount to legal error?

PARTIES TO THE PROCEEDINGS

Petitioner, who was the plaintiff below, is Crime Victim Russell Butler.

Respondent, who was the respondent below, is the United States District Court, Southern District of Texas, Houston Division.

Respondent, who was a defendant-real party in interest below, is the Estate of Defendant Kenneth L. Lay.

Respondent, who was a real party in interest below, is the United States of America in Criminal Action No. H-04-25 (S-2) *United States of America v. Kenneth L. Lay*.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner is not a corporation.

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OPINIONS BELOW

The decision of which review is sought is reported at *In re: Butler*, 06-20848 (5th Cir. November 1, 2006). The decision of the district court in *United States v. Estate of Kenneth Lay* denying Crime Victim's Motion Opposing Motion of Estate of Lay to Vacate His Conviction and Dismiss the Indictment is reported at 456 F. Supp. 2d 869 (S.D. Tex. 2006).

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Crime Victims Rights Act, 18 U.S.C. § 3771; the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A; the Substantive Due Process Clause of the Fifth Amendment, U.S. Const. amend. V; and the Takings Clause of the Fifth Amendment, U.S. Const. amend. V.

STATEMENT

On May 25, 2006 after a sixteen week jury trial and a one week bench trial Kenneth L. Lay was found guilty beyond a reasonable doubt and convicted on all ten counts of his indictment leading to the possible collection of

millions of dollars in fraud proceeds that would be utilized to reimburse crime victims and the United States. Sentencing was originally set for September 11, 2006 and a presentence report was ordered pursuant to Rule 32 of the Federal Rules of Criminal Procedure requiring a probation officer to conduct an investigation and submit a report that contains sufficient information for the court to order restitution. The initial presentence report was ordered to be disclosed to counsel on July 7, 2006.

After awaiting justice for close to five years, thousands of crime victims breathed a sigh of relief—the criminal justice system had worked. Now, the crime victims looked forward to a restitution order promised under the federal Crime Victims Rights Act as well as the Mandatory Victims Restitution Act in hopes of recouping even a small measure of their devastating economic loss.

Since the passage of the Crime Victims Rights Act in late 2004, victims of federal crimes have not only had the right to full and timely restitution but also an appellate mechanism to ensure that their federal rights are protected. *See* 18 U.S.C. § 3771.

Previous to the enactment of the landmark Crime Victims Rights Act, the federal restitution laws were amended by the Mandatory Victims Restitution Act of 1996 guaranteeing crime victims restitution but without an appellate remedy for violations. 18 U.S.C. § 3663A. The need to revamp the federal restitution laws was evident within the legislative history of the Mandatory Victims Restitution Act stating:

> [u]nder existing law, crime victims' rights are still too often overlooked. Even though the law provides the means to address the rights of victims,

> the law does not, however, provide for a means to make victims whole. H.R. 665, the "Victim Restitution Act of 1995," is an important step forward in ensuring justice for the victims of crime and accountability for convicted criminals. By requiring full financial restitution, the Act requires the offender to face the harm suffered by his victims and, to others harmed by his unlawful actions. Further, it strives to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime.

H.R. Rep. 104-16, H.R. Rep. No. 16, 104th Cong., 1st Sess. 1995, 1995 WL 43586 (Leg.Hist.).

However, on July 5, 2006, any hope for a prompt determination regarding restitution was dashed when Mr. Lay died unexpectedly. Just over a month after Mr. Lay's death, on August 8, 2006, Mr. Lay's criminal defense attorneys filed a motion on behalf of the Lay Estate asking the court to permit the Lay Estate to step into the shoes of the defendant. The unopposed motion was granted. Now acting on behalf of the Lay Estate—Mr. Lay's attorneys filed a motion to vacate his convictions and dismiss the indictment. The motion was opposed by the United States as well as Mr. Butler, a crime victim pursuant to the Crime Victims Rights Act.

Like thousands of other Lay crime victims, Mr. Butler invested $8,000 in Enron stock in order to prepare for his retirement from the Maryland Crime Victims' Resource Center, Inc., a non-profit organization. Mr. Butler received notice regarding the Lay Estate's substitution motion in a Washington Post article published just after the motion was filed. Mr. Butler retained counsel shortly thereafter.

On October 17, 2006, the district court granted the Lay Estate's Motion to Vacate His Convictions and Dismiss the Indictment. The district court based its decision on the Fifth Circuit's *en banc* decision in *United States v. Parsons*, 367 F.3d 409 (5th Cir. 2004), which overturned *United States v. Mmahat,* 106 F.3d 89 (5th Cir. 1997), a decision holding that restitution that was ordered to make victims whole was compensatory and did not abate if defendant died during pendency of appeal. (App. 5).

Notably, the *Parsons* case was decided just months prior to the passage of the Crime Victims Rights Act. Applying *Parsons*, the Court held that pursuant to the Fifth Circuit's "finality principle," which reasons that "the state should not label one as guilty until he has exhausted his opportunity to appeal," the Court concluded that any right to restitution also abates *ab initio*. (App. 5).

Pursuant to the Crime Victims Rights Act and the Mandatory Victims Restitution Act, Mr. Butler a Crime Victim, sought relief by petitioning the Fifth Circuit for a writ of mandamus. 18 U.S.C. § 3771(d)(3). The petition for writ of mandamus was denied. (App. 1). The Court held that it was bound by its *en banc* precedent in *Parsons*, "which firmly and unequivocally established that most recently for this circuit the rule that when a defendant has been found guilty of a federal crime dies before exhaustion of his appeal, his prosecution must be abated, his conviction vacated, and his indictment dismissed." (App. 1).

In addition, the Fifth Circuit held that " . . . because we agree with the Second Circuit that 'the CVRA does not grant victims any rights against individuals who have not been convicted of a crime, mandamus must be denied."

(App. 1). Finally, the Court acknowledged, "[u]nless the law of this circuit as set forth in *Parsons* is changed retroactively by Congress, by the Supreme Court, or by this court revisiting our precedent en banc, we . . . are bound to apply and enforce the doctrine of abatement." (App. 1).

REASONS FOR GRANTING THE WRIT

The Court should grant the petition because the case satisfies the criteria set forth in S. Ct. R. 10(a) and (c). This is a case of first impression in this Court. This Court has never addressed the question of whether the right to compensatory restitution survives the convicted defendant's death. The circuit court decision below not only conflicts squarely with decisions from other circuits and state courts but also has contributed to a growing split of authority at both the state and circuit level on an issue of great public importance that, without this Court's intervention, will leave thousands of crime victims stripped not only of their right to millions of dollars in restitution for their economic loss but also many of their statutory rights under the Crime Victims Rights Act—not only in this case, but also in future cases.

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE INVOLVING THE LEGAL FICTION OF ABATING *AB INITIO* THE CONVICTION, INDICTMENT AND CONSEQUENTLY, A CRIME VICTIM'S RIGHT TO RESTITUTION AND FAIRNESS BROUGHT TO THE FOREFRONT IN *UNITED STATES VERSUS KENNETH LAY* RESULTING IN THOUSANDS OF VICTIMS BEING DENIED THEIR FEDERAL RIGHTS TO FAIRNESS AND RESTITUTION.

On October 30, 2004 Congress passed the Crime Victims Rights Act by an overwhelming margin. 18 U.S.C. § 3771 (hereinafter CVRA) (App. 19). The CVRA codified several important rights including the right to fairness and the right to full and timely restitution. In 1996, Congress passed the Mandatory Victim Restitution Act making restitution obligatory. These two pieces of federal legislation together demonstrate that it is the national public policy of this country to ensure that crime victims are fully compensated for their economic losses caused by the crime committed by the defendant.

Just a few months prior to the passage of the landmark CVRA, the Fifth Circuit abruptly changed course and overruled its holding in *United States v. Mmahat*, one of the leading abatement *ab initio* cases in the country and one of the few addressing restitution issues. Until 2004, the Fifth Circuit precedent provided that the obligation of a defendant's estate included the obligation to satisfy restitution after a conviction against the defendant in federal court. *See United States v. Mmahat*, 106 F.3d 89 (5th Cir. 1997); *United States v. Asset*, 990 F.2d 208 (5th Cir. 1993).

As discussed in detail in the Fifth Circuit's dissent in *Parsons*, the *Parson's* decision as applied in this case "judicially create[s] a rule, contrary to federal statutes and common law that a judgment requiring a criminal defendant to make restitution to his victims also abates upon his death. *Parsons*, 367 F.3d 409 at 420 (Dissent, Dennis, Higginbotham, Davis, Wiener, Benavides and Stewart).

Prior to the *en banc* decision in *Parsons*, some courts had already adopted a procedure for protecting the rights of both the defendant and the victim by permitting the deceased defendant's estate to substitute for the defendant and appeal any compensatory restitution ruling. This testing of the compensatory restitution order of a defendant who dies during pendency of the appeal assures that the compensatory restitution consequences or fruits would not flow from an untested conviction.

As the tables on pages 15 and 16 demonstrate, at least five jurisdictions have permitted—or at least have not precluded the remedy of substitution—so that the right to fairness is extended not only to the convicted defendant but to the victim as well. As discussed by the *Parson's* dissent, in these jurisdictions, an appropriate motion to the court to substitute the estate for the deceased defendant may be filed as was done in this case and then the estate can appeal the compensatory restitution order in the deceased defendant's place and make arguments which potentially could result in a reversal of any restitution order. *Id.* at 409.

After the *Parsons en banc*, Congress adopted the CVRA which provided a mechanism for crime victims to enforce their rights including restitution. 18 U.S.C. § 3771

(App. 19). Part of this sea-change included the right of crime victims to fairness. 18 U.S.C. § 3771(a)(8) (App. 19).

Unless this Court reviews the decision below, the national policy illustrated by not one but two federal statutes—the goals of the CVRA and the MVRA—will continue to be frustrated and the legal fiction of abatement *ab initio* will extinguish crime victims' right to restitution and undermine the Congressional intent requiring federal criminal defendants to pay compensatory restitution to the identifiable victims of their crimes.

The United States District Court and the Fifth Circuit failed to consider the mandate of the CVRA regarding fairness to crime victims and of the mandates of both the CVRA and the MVRA regarding restitution to crime victims upon conviction which occurred in this case. 18 U.S.C. § 3771(a)(8). *See also State v. Korsen*, 141 Idaho 445, 450 (2005) (recognizing the fundamental unfairness suffered by victims when defendant's conviction and indictment is abated *ab initio*—as if the crime never occurred—leaving crime victims to pick up the pieces with no recognition from the criminal justice system that the crime ever occurred.[1]

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[1] *E.g. United States v. Heaton*, No. 2:06-CR-00014 PGC (D. Utah Oct. 24, 2006) (Court noted that under the CVRA victims have the right "to be treated with fairness . . . ," and to be treated with fairness means "treating the 'justly' and 'equitably.' "); *State v. Korsen*, 141 Idaho 445, 450 (2005) (Holding that:

> The people of Idaho subsequently enshrined these rights of crime victims in the Constitution of the State of Idaho at the general election on November 8, 1994. *See* Art. I, § 22, Idaho Constitution.
>
> With the enactment of I.C. § 19-5304(2), there is a strong public policy ground for not abating a criminal conviction. If

(Continued on following page)

Some courts have suggested that the doctrine of abatement *ab initio* may harm victims only minimally because victims can always seek a civil remedy. *See Parsons* at 416 fn. 17 and *In re: Butler* (App. 1). Such a suggestion fundamentally misunderstands the demands and consequences placed on a victim of crime. For instance in this case, it took over five years for Mr. Lay to come to trial—far beyond most statutes of limitation. Also, it is not uncommon for prosecutors to discourage victims from filing a civil suit until after the criminal case has been resolved. In most jurisdictions, the statute of limitations has run by the time a criminal case reaches verdict. Then, as it happened in this case, it can be months later until sentencing. Here, justice delayed is certainly justice denied.

Upon the death of Mr. Lay, many victims including Mr. Butler, are now left with absolutely no federally mandated remedy in which to be reimbursed for the criminal acts of the defendant. This result surely runs afoul of national public policy ordering restitution upon

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the conviction is abated, it may abate the restitution order because, under the statute, a conviction or finding of guilt is necessary for an order of restitution. Further, abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide.

Thus, by virtue of the substantial changes brought about by the above-referenced provisions, particularly the victims' rights provisions, we hold that a criminal conviction and any attendant order requiring payment of court costs and fees, restitution or other sums *to the victim*, or other similar charges, are not abated, but remain intact, in the event of the defendant's death following conviction.").

Id.

conviction of a federal crime. The result will also eliminate a victim's due process right to his property interest in a claim for restitution. *United States v. Perry*, 360 F.3d 519, 526 (6th Cir. 2004) (Serious due process issues arise when federal courts read a restitution statute in a manner that will terminate a constitutionally recognized property interest created under federal law.).[2]

Abatement *ab initio* eliminating a victim's right to restitution under the CVRA and the MVRA after conviction of a defendant as occurred in this case is contrary to the due process and taking provisions of the Fifth Amendment. The conflicting holdings of other Circuits allowing restitution to continue subsequent to a defendant's conviction notwithstanding the death of a defendant properly balance defendants' rights and victims' rights. Substitution protects a defendant's estate if they want to challenge the underlying conviction or the amount of restitution ordered.[3] Substitution therefore allows for the defendant's estate to receive due process and for crime victims to receive due process.

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[2] *See also Parsons*, 397 at 421 dissent stating: "Under the MVRA and the VWPA, as amended, the court's restitution order expressly creates a *property right* for the victim or his estate which has the effect of a civil judgment against the criminal defendant or his estate. A restitution order is a heritable, assignable, civil judgment 'in favor or such victim,' and when properly recorded, 'shall be a lien on the property of the defendant . . . in the same manner . . . as a judgment of a court of general jurisdiction.' "

[3] *E.g. Surland v. State*, 392 Md. 17, 36 (2006) (Allowing the defendant's survivors who wish to pursue an appeal, to preserve the defendant's estate against a claim for some fines, costs, or restitution, to clear the defendant's record and reputation, or to vindicate some legal principle that was important to the defendant, the ability to do so in place of the defendant, who could have maintained the appeal had the defendant survived.).

Criminal restitution is intended to offer an efficient quasi-tort remedy for victims of crime. This remedy is best described by Judge Posner in *United States v. Bach*, 172 F.3d 523 (7th Cir. 1999) stating in part, "[R]estitution under the MVRA . . . is functionally a tort remedy—a streamlining of procedures that allows a victim to recover a compensatory remedy though 'a summary proceeding ancillary to the criminal prosecution.'" *Id.*

The legislative history of the MVRA echoes this reasoning. H.R. 665, the Victim Restitution Act of 1995 is intended to:

> ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime. . . . Under existing law, crime victims' rights are still too often overlooked. Even though the law provides the means to address the rights of victims, the law does not, however, provide for a means to make victims whole. H.R. 665, the "Victim Restitution Act of 1995," is an important step forward in ensuring justice for the victims of crime and accountability for convicted criminals. By requiring full financial restitution, the Act requires the offender to face the harm suffered by his victims and, to others harmed by his unlawful actions. Further, it strives to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime.

H.R. Rep. 104-16, H.R. Rep. No. 16, 104th Cong., 1st Sess. 1995, 1995 WL 43586 (Leg.Hist.).

"Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort

proceedings were not clearly distinguished." *Parsons*, 367 F.3d 409 at 424 (dissent).

Furthermore, contrary to the Fifth Circuit's holding below, in *United States v. Asset*, the Fifth Circuit recognized—prior to its holding in *Parsons*—that it can order compensation of a crime victim without "sentencing" the deceased defendant when the defendant, like Mr. Lay, died after verdict but prior to sentencing. In fact, the Fifth Circuit held that it was within the power of the court to ensure that the victims were compensated short of sentencing the defendant. *United States v. Asset*, 990 F.2d 208 at 210.[4]

II. IN THE ADVENT OF RECENT FEDERAL LAW GUARANTEEING CRIME VICTIMS THE RIGHT TO FAIRNESS AND RESTITUTION, THE CIRCUITS AND MANY STATES ARE PROFOUNDLY SPLIT IN MULTIPLE DIRECTIONS OVER WHETHER CRIMINAL RESTITUTION IS PENAL OR COMPENSATORY.

The tables on pages 15 and 16 demonstrate the chaotic nature of the abatement *ab initio* doctrine—especially

[4] In *Asset*, as part of a plea bargain, defendant agreed to pay the victim $50,000 in restitution at the change of plea. Like Mr. Lay, the defendant died prior to sentencing. The defendant's estate stepped into the shoes of the deceased defendant and asked the court to abate the conviction and the indictment as well as ordering the victim to return the $50,000. The district court abated all penal aspects of the conviction but denied estate's motion to return the restitution: "Since Asset had not been sentenced, the defendant was not being punished, as only the Court can impose punishment by way of sentencing, but was agreeing to compensate the victim." The Fifth Circuit affirmed the judgment of the district court though *Parson's* has abrogated at least portions of this decision.

when a victim's right to restitution is at stake. Federal rights for crime victims are still in their infancy. However, the states have truly served as the market place of ideas over the last twenty years and have led the way in developing victim's rights case law. The table on page 16 illustrates the recognition of recent state legislative and constitutional enactments guaranteeing crime victims fairness and restitution as well as the struggle in balancing such rights with the rights of the defendant in the context of the abatement doctrine.

These states as well as several circuits demonstrate the need for clarity and guidance so that the doctrine of abatement continues to recognize changes in the law ensuring that fairness is also accorded to the convicted defendant's victim.

Unless this Court provides guidance, the federal right to restitution will continue to be applied unevenly, necessarily resulting in further harm to crime victims—a result clearly not intended by federal statute.

As the tables demonstrate, the courts seem to be split in two general ways: one set of decisions focuses exclusively on the rights of criminal defendants with the result being that when a defendant dies, all rights of the victims are extinguished; and a second set attempts to harmonize the rights of defendants and victims.

The Fifth and Tenth Circuits hold that regardless of the purpose of a restitution order, it abates if defendant dies while appeal from his conviction is pending. *United States v. Parsons*, 309 F.3d 409 (5th Cir. 2004); *United States v. Logal*, 106 F.3d 1547 (10th Cir. 1997). While the Fourth, Third and Ninth Circuit hold generally that restitution is more compensatory than penal and seem to

permit restitution order to stand after abatement of penal elements of conviction. *United States v. Dudley*, 739 F.2d 175 (4th Cir. 1984); *United States v. Christopher*, 273 F.3d (3rd Cir. 2001) and *United States v. Cloud*, 921 F.2d 225 (9th Cir. 1990). Table on page 16 demonstrates that some states also join the Fourth, Third and Ninth Circuits in holding for abatement purposes that restitution is more compensatory than penal: Idaho, Maryland, Michigan, Alabama and Washington.

In 1996 and again in 2004, Congress enacted a national policy ensuring that crime victims are no longer treated "like good Victorian children, seen but not heard." *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1016 (9th Cir. 2006). In two pieces of national legislation, Congress has stated that crime victims have a right to restitution thus ensuring that the benefits derived by a defendant's wrongdoing do not unjustly enrich the defendant's estate thus utilizing them to repair the victim's losses.[5] In the lower court, these federal statutes were ignored.

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[5] *United States v. Parsons*, 367 F.3d 409 at 423 (5th Cir. 2004) (dissent, quoting *United States v. Christopher*, 273 F.3d at 299 (3rd Cir. 2001)), "To absolve the estate [of the defendant] from refunding the fruits of the wrongdoing would grant an underserved windfall."

SPLIT IN AUTHORITY OVER RESTITUTION

Citation	*U.S. v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004)	*U.S. v. Cloud*, 921 F.2d 225 (9th Cir. 1990)	*U.S. v. Christopher*, 273 F.3d 294 (3rd Cir. 2001)	*U.S. v. Logal*, 106 F.3d 1547 (10th Cir. 1997)	*U.S. v. Dudley*, 739 F.2d 175 (4th Cir. 1984)	*U.S. v. Duyer*, 855 F.2d 144 (3rd Cir. 1988)	*U.S. v. Asset*, 990 F.2d 20 (5th Cir. 1993)
Restitution compensatory or penal?	Unclear (at 415). Dissent (Dennis, Higginbotham, Davis, Wiener, Benavides, Stewart): compensatory (at 420, 423-24)	Both (at 226)	More compensatory than penal (at 299)	Penal	Predominantly compensatory (at 177)	Not discussed	Both (at 213)
Issue of case	Whether a restitution order survives abatement *ab initio*	Whether restitution order survives the death of the defendant	Whether restitution order survives the death of the defendant	Whether restitution order survives the death of the defendant	Whether restitution order survives the death of the defendant	Whether defendant's attorneys had authority to make motion to abate defendant's conviction	Whether restitution shoul be returned to a defendant's estate when the defendant died before sentencing but after entering into a plea agreement and had alreac paid restitution
Estate substituted for deceased?	Yes, but opinion discourages practice in general for future defendants (at 416 footnote 17) Dissent: Would continue substitution practice under *Mmahat* for purposes of appeal (at 419-20)	Not discussed	Widow allowed to substitute for defendant	No, defendant's attorney motioned the court for abatement	Leaves it open (at 179)	No, and defendant's attorneys were not permitted to do so (at 145)	Yes (at 210) and permits substitution without need to actually "sentence" D since D died prior to sentencing
Applicable precedent	Overruled *U.S. v. Mmahat*, 106 F.3d 89 (5th Cir. 1997), and *U.S. v. Asset*, 990 F.2d 208 (5th Cir. 1993) thereby putting CA5 in conflict with CA9, CA3 and CA4		Stated holding is not in conflict with *U.S. v. Edwards*, 162 F.3d 87, which addressed an ex post facto challenge	*U.S. v. Johnson*, 983 F.2d 216 (11th Cir. 1993)		*In re Chin*, 848 F.2d 55 (4th Cir. 1988)	*U.S. v. Dudley*, 739 F.2d 175 (4th Cir. 1984) and *U.S. v. Cloud*, 921 F.2d 2 (9th Cir. 1990)
Result	Restitution is eliminated under abatement *ab initio* doctrine in a 9-6 en banc decision. Dissent would continue *Mmahat* compensatory restitution after abatement of penal aspects	Restitution is allowed after the death of the defendant	Restitution survives the death of defendant and abatement of defendant's conviction	Restitution order is eliminated upon abatement of defendant's conviction	Restitution is preserved even after conviction is abated	Defendant's attorneys were not permitted to make a motion to abate defendant's conviction	Defendant's conviction is abated but compensatory restitution previously pai is not refunded. *Asset* is later abrogated by *Parson* but district court cites for purposes of abating Mr. Lay's conviction.

SPLIT IN AUTHORITY FOR STATE CASES OVER RESTITUTION					
Citation	*Surland v. State*, 392 Md. 17, 895 A.2d 1034 (2006)	*State v. Devin*, 158 Wash.2d 157, 142 P.3d 599 (2006)	*State v. Korsen*, 141 Idaho 445, 111 P.3d 130 (2005)	*Wheat v. State*, 907 So.2d 461 (Ala. 2005)	*People v. Peters*, 449 Mich. 515, 537 N.W.2d 160 (1995)
Restitution compensatory or penal	Analysis given (at 24-26) but no position taken	Both but has a strong compensatory purpose (at 168-69)	Compensatory (at 450 at 135)	No restitution at issue	Both (at 523-24 at 164)
Issue of case	Whether a conviction abates *ab initio* along with any restitution order	Whether state legislation making restitution mandatory trumps common law abatement doctrine (at 168)	Whether abatement *ab initio* is favored and eliminates restitution orders	Whether abatement *ab initio* is favored	Whether to abate restitution order with conviction
Estate substituted for decedent?	Yes (at 35-37)	Unclear, but not precluded (at 172)	Not addressed in this opinion (at 448 at 133)	Not discussed	Not discussed
Applicable precedent	Overruled *Trindle v. State*, 326 Md. 25, 602 A.2d 1232 (1992)	Overruled *State v. Furth*, 82 Wash. 665, 144 P. 907 (1914) as inconsistent with modern victim compensation	String cite noting general trend away from abatement *ab initio* (at 448 at 133)	*People v. Robinson*, 298 Ill. App.3d 866, 699 N.E.2d 1086 (1998)	*U.S. v. Dudley*, 739 F.2d 175 (4th Cir. 1984); *U.S. v. Asset*, 990 F.2d 208 (5th Cir. 1993); *U.S. v. Cloud*, 921 F.2d 225 (9th Cir. 1990)
Result?	Upon death of defendant, a substituted party is allowed to decide whether to pursue an appeal. If no appeal is pursued the conviction stands and restitution remains (at 36-37)	Restitution does not abate with the conviction because it is contrary to the purpose of victim compensation laws (at 172)	Restitution is not abated with the death of the defendant because it is compensatory and public policy no longer favors abatement *ab initio* (at 450 at 135)	Conviction is abated, but notation is placed in the record that the presumption of innocence is eliminated and conviction was abated because defendant died while appeal was pending (at 464)	Upon death of defendant the appeal is dismissed but the conviction retained because the presumption of innocence is eliminated (at 521-22, at 163-64)

III. THE COURTS BELOW FAILED TO APPLY THE RECENTLY ENACTED FEDERAL CRIME VICTIMS RIGHTS ACT THAT ENDORSES THE MANDATORY VICTIMS RESTITUTION ACT DISMISSED BY THE FIFTH CIRCUIT IN THE CONTEXT OF ABATEMENT AND INTRODUCES A HOLDING THAT EFFECTIVELY NULLIFIES THE VAST MAJORITY OF THE RIGHTS GUARANTEED BY THE CRIME VICTIMS RIGHTS ACT FOR CRIMES OCCURRING IN THE FIFTH CIRCUIT.

The Crime Victims Rights Act guarantees federal crime victims eight specific rights.[6] The eight rights guaranteed to crime victims attach upon the commission of a crime.[7] Contrary to holdings in both the Fifth Circuit and the Second Circuit, rights afforded under the CVRA

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[6] A crime victim has the following rights: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

[7] Pursuant to 18 U.S.C. § 3771(e), a crime victim means, "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

are also pre-conviction rights that have also been recognized by other circuits.[8]

In the case below, the Fifth Circuit joined the Second Circuit in eviscerating the CVRA by holding that "[t]he CVRA does not grant victims any rights against individuals who have not been convicted of a crime." (App. 1). The holdings of the Fifth and Second Circuit are in conflict with the clear language of the CVRA as well as numerous circuits and district courts and must be addressed. Without this Honorable Court's intervention, federal crime victims with crimes occurring in the Second or Fifth Circuit will be without the protections guaranteed by federal law. The CVRA will amount to a mere paper promise contrary to Congress' intent.

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[8] *Kenna v. District Court*, ___ F.3d ___, 2006 WL 1897095 (9th Cir. July 5, 2006); *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005); *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Il. 2005); *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555 (2d Cir. 2005); *United States v. Ingrassia*, 2005 WL 2875220, No. CR-04-0455ADSJO (E.D.N.Y. Sept. 7, 2005); *United States v. Ingrassia*, 392 F. Supp. 2d 493 (E.D.N.Y. 2005); *United States v. W.R. Grace*, 401 F. Supp. 2d 1057 (D. Montana 2005); *United States v. Eight Automobiles with Fraudulently Obtained Ohio and New York State Division of Motor Vehicle Titles*, 356 F. Supp. 2d 223 (E.D.N.Y. 2005); *United States v. McDaniel*, 411 F. Supp. 2d 1323 (D. Utah 2005); *United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. July 22, 2005) (unreported opinion); *In re Mikhel v. District Court*, ___ F.3d ___, 2006 WL 1916082 (9th Cir. July 7, 2006); *United States v. Charles*, ___ F.3d ___, 2006 WL 2169353 (1st Cir. 2006); *United States v. Johnson*, 362 F. Supp. 2d 1043 (N.D. Iowa 2005); *United States v. W.R. Grace*, 408 F. Supp. 2d 998 (D. Montana 2005); *United States v. Kaufman*, ___ F. Supp. 2d ___, 2005 WL 2648070 (D. Kan. Oct. 17, 2005); *United States v. L.M.*, ___ F. Supp. 2d ___, 2006 WL 855806 (N.D. Iowa March 31, 2006); *United States v. Heaton*, No. 2:06-CR-00014 PGC (D. Utah Oct. 24, 2006).

The high profile nature of this case, which impacts literally thousands of crime victims provides the perfect vehicle to ensure not only that the abatement *ab initio* issue is resolved consistently with federal law but also to clarify when the rights guaranteed under the CVRA are enforceable.

CONCLUSION

For all the foregoing reasons, petitioner respectfully asks this Honorable Court to grant the petition.

Respectfully submitted,

CRIME VICTIMS LEGAL
ASSISTANCE PROJECT
STEVE TWIST*
KELI LUTHER
P.O. Box 877906
Tempe, AZ 85287-7906
Counsel for Petitioner

**Counsel of Record*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20848

In Re:
RUSSELL P. BUTLER,
Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

(Filed Nov. 01, 2006)

Before DAVIS, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus filed October 27, 2006, by petitioner Russell P. Butler is DENIED.

Petitioner seeks mandamus from this court pursuant to 18 U.S.C. § 3771(d)(3), the Crime Victims Rights Act ("CVRA"). Specifically, petitioner, on behalf of himself and others, asks this court to issue the writ of mandamus ordering the district court to reverse its ruling of October 17, 2006, in *United States v. Jeffrey Skilling and Kenneth Lay,* granting the motion of defendant Lay's estate to vacate his conviction and dismiss his indictment. The

district court's order was grounded in the doctrine of abatement, as most recently recognized for this circuit in *United States of America v. Estate of Parsons,* 367 F.3d 409 (5th Cir. 2004) (en banc). We decline to issue a writ of mandamus.

Like the district court before us, we are bound by our en banc precedent in *Parsons,* which firmly and unequivocally established most recently for this circuit the rule that when a defendant who has been found guilty of a federal crime dies before exhaustion of his appeal, his prosecution must be abated, his conviction vacated, and his indictment dismissed. Moreover, *Parsons* requires that the doctrine of abatement be applied when a convicted federal defendant dies while his appeal is pending, because death "abates, *ab initio,* the entire criminal proceeding." *Id.* at 413. It is axiomatic that application of abatement following the death of a convicted defendant under circumstances such as those present here has the legal effect of expunging the entire proceedings as though none had ever occurred – not the indictment; not the trial; not the verdict.

That our en banc decision in *Parsons* predated the CVRA is of no import. We find nothing in the CVRA or other legislation, either express or implicit, that purports to exempt the provisions of that act from the venerable abatement doctrine. The CVRA provides only that a crime victim is entitled to "full and timely restitution *as provided in law.*" 18 U.S.C. § 3771(a)(6) (emphasis added).

The law of our circuit on the subject is provided by *Parsons*, 367 F.3d at 415, which mandates that the conviction of a defendant who dies before he has the opportunity to appeal be expunged. Because, under *Parsons,* Lay has no longer been convicted, and because we agree with the

Second Circuit that "the CVRA does not grant victims any rights against individuals who have not been convicted of a crime," mandamus must be denied. *United States v. Rigas (In re W.R. Huff Asset Mgmt. Co.),* 409 F.3d 555, 564 (2d Cir. 2005).

Neither do we perceive any tension between abatement and the accrual of victims' rights under the CVRA as of conviction. Petitioner does not argue that, had the defendant lived and been successful on appeal, obtaining reversal of his convictions and a judgment of acquittal, the CVRA would nonetheless have vested petitioner's rights (and those of others similarly situated) as of the defendant's conviction, irrespective of its subsequent reversal. We see no distinction, for purposes of the CVRA, between death pending appeal and reversal on appeal.

True, the CVRA relates back to the date of conviction, but not, we are convinced, until the conviction becomes final, executory, and no longer appealable. Because petitioner's due process and takings claims (assuming *arguendo* they have not been waived and that petitioner is, in fact, a "crime victim" within the meaning of the CVRA) are predicated on the existence of a property right in restitution that is not granted by the CVRA, these claims lack merit as well.

Unless the law of this circuit as set forth in *Parsons* is changed retroactively by Congress, by the Supreme Court, or by this court revisiting our precedent en banc, we and the courts of this circuit are bound to apply and enforce the doctrine of abatement. This requires that we deny the instant petition for writ of mandamus.

The petition for writ of mandamus is DENIED. The motion to stay the order of the district court is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	CRIMINAL ACTION
v.	§	NO. H-04-0025
	§	
KENNETH L. LAY,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed October 17, 2006)

On May 25, 2006, following a sixteen week jury trial and a separate one week bench trial, Kenneth L. Lay was found guilty of all ten counts charged against him in the Second Superseding Indictment: conspiracy to commit securities and wire fraud (count 1), wire fraud involving false and misleading statements in employee meetings (counts 12-13), securities fraud involving presentations to securities analysts and rating agency representatives (counts 27-29),[1] bank fraud (count 38), and making false statements to banks (counts 39-41).[2] On July 5, 2006, Lay suffered a heart attack and died. Pending before the court are the Motion of the Estate of Kenneth L. Lay to Vacate His Conviction and Dismiss the Indictment (Docket Entry No. 1082), and the motion of alleged crime victim Russell L. Butler for an order of restitution contained in Crime Victim's Motion Opposing Motion of the Estate of Lay to Vacate His Conviction and Dismiss the Indictment (Docket

[1] Jury Verdict, Docket Entry No. 1015.

[2] Memorandum of Decision and Verdict, Docket Entry No. 1019.

Entry No. 1091). For the reasons explained below, the estate's motion to vacate and dismiss will be granted, and Butler's motion for an order of restitution will be denied.

I. Motion to Vacate and Dismiss

Citing *United States v. Estate of Parsons,* 367 F.3d 409 (5th Cir. 2004) (en banc), the estate argues that Lay's conviction should be vacated and that the indictment as it relates to Lay should be dismissed because Lay's death deprived him of his right to pursue a planned appeal. The estate asserts that Lay engaged counsel to file and prosecute an appeal, that on the morning of July 5, 2006, Lay was pronounced dead in Aspen, Colorado, and that by Order of the Probate Court No. 1 of Harris County, Texas, in Cause No. 365,466 entered on August 8, 2006, Letters Testamentary were issued to Linda P. Lay as Executrix of the Last Will and Testament of Kenneth L. Lay.[3] In an unopposed motion filed on August 9, 2006, (Docket Entry No. 1079), the executrix sought leave to substitute the estate for Lay in this action so that the estate could file and prosecute the pending motion to vacate and dismiss.

On August 10, 2006, the court granted the motion to substitute (Docket Entry No. 1081). The estate argues that the doctrine of abatement *ab initio* applied in *Parsons,* 367

[3] See Certified copy of the Order Probating Will and Authorizing Letters Testamentary and an original Letters Testamentary in re: Estate of Kenneth Lee Lay, Deceased, attached to Unopposed Motion for Substitution of the Estate of Kenneth L. Lay for Defendant Kenneth L. Lay, Docket Entry No. 1079.

F.3d at 409, requires the court to grant the pending motion to vacate and dismiss.[4]

II. Opposition to Motion to Vacate and Dismiss

A. United States' Opposition

Without disputing the estate's argument that *Parsons,* 367 F.3d at 409, requires abatement *ab initio* of this action against Lay, "[t]he United States opposes [the pending motion to vacate and dismiss] on grounds that the Lay Estate should not be unjustly enriched with the proceeds of fraud that would otherwise be subject to forfeiture and distribution to Lay's victims."[5] Asserting that "the verdicts established Lay's fraud as charged in the indictment beyond a reasonable doubt,"[6] and that the guilty verdicts returned against him provide a "basis for the likely disgorgement of fraud proceeds totaling tens of millions of dollars,"[7] the United States "requests that the Court defer ruling on the motion filed by the Lay Estate until the previously scheduled date of sentencing, October 23, 2006."[8] The United States explains that by deferring its ruling the court will allow Congress "a reasonable opportunity to address the issue of abatement through a legislative proposal that has recently been presented."[9]

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[4] Motion of the Estate of Kenneth L. Lay to Vacate His Conviction and Dismiss the Indictment, Docket Entry No. 1082, p. 3.

[5] United States' Opposition to the Motion of the Estate of Lay to Vacate His Conviction and Dismiss the Indictment, Docket Entry No. 1089, p. 2.

[6] *Id.* at p. 1.

[7] *Id.*

[8] *Id.* at p. 2.

[9] *Id.*

B. Crime Victim's Opposition

Russell P. Butler, an individual who asserts that he is a victim of the crimes for which Lay was found guilty, moves the "Court to order restitution based on the conviction of Defendant Lay . . . pursuant to 18 U.S.C. § 3771(6) and (8) as well as Mandatory Victims Restitution Act of 1996, PL 104-132, 1996 S. 735."[10] Butler argues that the estate's motion to vacate and dismiss should be denied because "such an order would violate the Crime Victim's due process right to statutorily authorized restitution."[11] Asserting that the CVRA "codifies several statutory rights implicated by the Lay Estate's motion including the right to fairness; the right to notice; the right to be present; the right to be heard as well as the right to full and timely restitution,"[12] Butler argues that

> enactment of the CVRA transforms the Lay Estate's seemingly routine abatement motion into a case of first impression [because] . . . if granted, [it] will leave Mr. Butler – and thousands of additional crime victims – . . . stripped of their statutory right to restitution for the crimes committed by Kenneth L. Lay.[13]

Citing the dissent in *Parsons,* 367 F.3d at 421-422, Butler argues that these statutes "mandate restitution

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[10] Crime Victim's Motion Opposing Motion of the Estate of Lay to Vacate His Conviction and Dismiss the Indictment, Docket Entry No. 1091, p. 1.

[11] *Id.*

[12] *Id.* at p. 3.

[13] *Id.* at p. 4.

for designated crimes,"[14] and create "*a property interest* that is improperly erased if restitution is abated."[15]

III. Analysis

A. Controlling Authority

In *Durham v. United States,* 91 S. Ct. 858, 860 (1971) (per curiam), the Supreme Court adopted the so-called "abatement rule," holding that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception." *See also Parsons,* 367 F.3d 409; *United States v. Pauline,* 625 F.2d 684, 685 (5th Cir. 1980). Five years later in *Dove v. United States,* 96 S. Ct. 579 (1976) (per curiam), the Supreme Court overruled *Durham* in an opinion that the Fifth Circuit has described as "42 cryptic, enigmatic words." *Pauline,* 625 F.2d at 685. The *Dove* decision simply states that

> [t]he Court is advised that the petitioner died at New Bern, N.C., on November 4, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States,* 401 U.S. 481, 91 S. Ct. 858, 28 L. Ed.2d 200 (1971), may be inconsistent with this ruling, *Durham* is overruled.

96 S. Ct. at 579. Reasoning that "[t]here are substantial differences between appeals of right and petitions for certiorari," the Fifth Circuit joined other courts of appeals in concluding that *Dove* applies only to petitions for

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[14] Id. at p. 7.

[15] Id.

certiorari, not to appeals of right. *Pauline,* 625 F.2d at 685. *See also United States v. Asset,* 990 F.2d 208, 210 (5th Cir. 1993), *abrogated on other grounds by Parsons,* 367 F.3d at 409 ("It is well established in this circuit that the death of a criminal defendant pending an appeal of his or her case abates, *ab initio,* the entire criminal proceeding."); *United States v. Schuster,* 778 F.2d 1132, 1133 (5th Cir. 1985) ("Under the firmly established rule in this circuit, the death of a defendant pending conclusion of the direct criminal appeal abates, *ab initio,* not only the appeal, but the entire criminal proceeding.").

Nevertheless, prior to issuing its *en banc* opinion in *Parsons,* 367 F.3d at 409, the Fifth Circuit did not apply the doctrine of abatement *ab initio* to orders for restitution or forfeiture without first looking to the purpose for which such an order had been issued. *See Parsons,* 367 F.3d at 413. Orders intended to punish the defendant were considered penal and abated with the rest of the conviction while orders intended to make a defendant's victims whole were considered compensatory and survived the defendant's death. *Id.* (citing *United States v. Mmahat,* 106 F.3d 89, 93 (5th Cir.), *cert. denied,* 118 S. Ct. 200 (1997). In *Parsons* the Fifth Circuit examined the principles behind that doctrine of abatement *ab initio* and concluded that

> [t]wo primary approaches support abatement *ab initio.* The finality principle reasons that the state should not label one as guilty until he has exhausted his opportunity to appeal. The punishment principle asserts that the state should not punish a dead person or his estate. Although the finality principle best explains why criminal proceedings abate at death, finality does not

> justify the distinction between compensatory and penal restitution orders.

Id.

> The Fifth Circuit explained that
>
> [u]nder the finality rationale, we have described the entitlement to one appeal as follows:
>
> [W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the *interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal,* which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."
>
> *United States v. Pauline,* 625 F.2d 684, 685 (5th Cir.1980) (emphasis added, brackets in original) (quoting *Griffin v. Illinois,* 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956)).

Id. at 413-414 & n.8 (citing Rosanna Cavallaro, "Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal," 73 *U. Colo. L. Rev.* 943, 954 (2002) ("The abatement remedy relies significantly on a larger premise: a conviction that cannot be tested by appellate review is both unreliable and illegitimate; the constitutionally guaranteed trial right must include some form of appellate review."). The Fifth Circuit also explained that

> [t]he second rationale focuses on the precept that the criminal justice system exists primarily to punish and cannot effectively punish one who has died. "[T]he purposes of criminal proceedings are primarily penal – the indictment, conviction

> and sentence are charges against and punishment of the defendant – such that the death of the defendant eliminates that purpose."

Id. at 414 & n.10 (quoting *Asset,* 990 F.2d at 211). *See also Mmahat,* 106 F.3d at 93 (stating "the abatement principle is premised on the fact that criminal proceedings are penal."). The Fifth Circuit concluded that "regardless of its purpose, the order of restitution cannot stand in the wake of Parsons's death. Because he now is deemed never to have been convicted or even charged, the order of restitution abates *ab initio.*" *Id.* at 415. In reaching this decision the Fifth Circuit acknowledged that the government could argue "that this approach harms the interests of those allegedly injured," *Id.,* but concluded that "such an argument cannot outweigh the finality rationale." *Id.* The court explained that

> [a]ny references to the wrongful nature of the defendant and his actions are conditioned on an appellate court's upholding the conviction, assuming the defendant pursues an appeal. . . . The abatement doctrine provides that one should not be permanently labeled as finally "convicted" while his first appeal is pending. That is to say, in abatement the criminal court essentially abdicates its power over the former defendant.

Id. at 415-416.

The Fifth Circuit also explained that a different conclusion would run contrary to the text of both the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663(a) (1)(A), *id.* at 416, and the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A(a)(1). *Id.* at 417 & n.20.

The VWPA allows a court to enter a restitution order when "sentencing a defendant *convicted* of an offense." 18 U.S.C. § 3663(a) (1) (A) (emphasis added). If death terminates the criminal case *ab initio,* the defendant no longer stands convicted. One might respond to this natural reading by arguing that "convicted of an offense" has force only on the day on which the restitution order is entered. Because the defendant stands convicted on the day the court enters the order, retaining the order after the defendant's death would not conflict with the VWPA.

Additional text of the VWPA, however, suggests that "convicted" should not have force merely at the time of the restitution order. Section 3663(d) references 18 U.S.C. § 3664 as the enforcement mechanism for reimbursement orders. Section 3664(*l*) describes the effect of a conviction on future civil actions: "A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding."

A standard canon of construction "provides that a word used in different parts of the statute should be construed to have the identical meaning throughout the entire statute." If the narrower construction of "convicted" is applied to § 3664(*l*), an estate would be estopped from denying important factual matters in a subsequent civil suit, *even if the underlying conviction had been abated.* Just as a trial conviction, after abatement, should not estop an estate from mounting a defense in civil court, one whose conviction is abated no longer stands "convicted" for purposes of the VWPA.

Id. at 416-417 & n.19. In response to the dissenting judges' discussion of the Mandatory Victim Restitution Act (MVRA), the Fifth Circuit majority observed that "[e]ven if we consider the MVRA, however, it references the same enforcement provision – 18 U.S.C. § 3664 – as does the VWPA. Consequently, using the MVRA as a means of keeping the compensatory-penal dichotomy fails, for the reasons we have discussed." *Id.* at 417 & n.20.

B. Application of the Law to the Facts

Lay died before sentencing, before a final judgment could be entered, and before a notice of appeal could be filed. Therefore, unlike the defendants in *Parsons,* 367 F.3d at 409, and *Pauline,* 625 F.2d at 684, Lay did not die pending appeal. Nevertheless, the Fifth Circuit has plainly stated that "the rule of abatement applies equally to cases in which a defendant, such as [Lay], dies prior to the entry of judgment." *Asset,* 990 F.2d at 211 (citing *United States v. Oberlin,* 718 F.2d 894, 896 (9th Cir. 1983)).

1. • *United States' Opposition*

The United States' opposition is grounded on the principle that the Lay estate should not be unjustly enriched with the proceeds of fraud that would otherwise be subject to forfeiture and distribution to victims of the crimes for which Lay was found guilty. However, in *Parsons* the Fifth Circuit considered and rejected this concern by explaining that abatement of the criminal proceeding

> does not necessarily mean that an individual who suffered a loss cannot obtain reimbursement in *civil* court. If he can meet the civil court's lower burden of proof, he may receive a judgment

> from that court. The criminal court that entered the prior reimbursement order, however, should not retain any power over that prior defendant.
>
> One may argue that allowing the estate to substitute for the dead defendant ensures the fair representation of the decedent's interests, but such a substitution does not align logically with the abatement of all prior criminal proceedings. Essentially, the substitution doctrine forces the estate to argue about a conviction that no longer exists and requires a court to adjudicate the merits of a proceeding that no longer took place. Although it is not without a cost, requiring victims to argue their case in civil court protects the interests of defendants whose direct appeals are not yet final.

367 F.3d at 416 n.17. Although the United States argues that applicable law might change at some unknown future date, the court is bound to follow Fifth Circuit precedent.

2. *Butler's Opposition*

Butler's opposition is grounded on the principle that the VWPA, 18 U.S.C. § 3663, and the MVRA, 18 U.S.C. § 3663A, require the court to order restitution. However, in *Parsons* the Fifth Circuit considered and rejected a similar argument by explaining that these statutes allow a court to enter a restitution order when "sentencing a defendant *convicted* of an offense," 367 F.3d at 416, but that "[i]f death terminates the criminal case *ab initio,* the defendant no longer stands convicted." *Id.* Moreover, the facts of this case provide an additional reason for rejecting Butler's argument. Both statutes allow a district court to enter an order of restitution only "when sentencing a defendant . . ." 18 U.S.C. § 3663(a)(1) and 18 U.S.C.

§ 3663A(a)(1). Since Lay died before sentencing, and since neither statute allows the court to enter an order of restitution against Lay's estate, the court concludes that Butler has failed to cite any legal authority that would allow entry of the order of restitution that he seeks. Accordingly, the court concludes that Butler's motion seeking an order of restitution must be denied.

IV. Conclusion and Order

Since the Fifth Circuit Court of Appeals has adopted the abatement rule, and since neither the United States nor Butler has raised any legal basis for denying the rule's application in this case, the court concludes that Lay's conviction must be vacated and that this action against him must be dismissed. Accordingly, the Motion of the Estate of Kenneth L. Lay to Vacate His Conviction and Dismiss the Indictment (Docket Entry No. 1082) is **GRANTED,** and the motion of alleged crime victim Russell L. Butler for an order of restitution contained in the instrument titled Crime Victim's Motion Opposing Motion of the Estate of Lay to Vacate His Conviction and Dismiss the Indictment (Docket Entry No. 1091) is **DENIED**. The indictment against Kenneth L. Lay is **DISMISSED.**

SIGNED at Houston, Texas, this 17th day of October, 2006.

/s/ Sim Lake

SIM LAKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Cr. No. H-04-25**
	)	
JEFFREY K. SHILLING, and	)	
KENNETH L. LAY	)	

ORDER

BE IT REMEMBERED that on this the ___ day of ___, 2006 came on to be heard the Estate of Kenneth L. Lay's Request for Ruling and the Court having considered same is of the opinion that said Motion should be and is hereby Granted:

SIGNED AND ENTERED at Houston, Texas on this the ___ day of ___, 2006.

HONORABLE SIM LAKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Cr. No. H-04-25**
	)	
JEFFREY K. SHILLING, and	)	
KENNETH L. LAY	)	

ORDER

(Filed August 10, 2006)

BE IT REMEMBERED that on this the ___ day of ___, 2006 came on to be heard The Motion For Substitution of the Estate of Kenneth L. Lay For Defendant Kenneth L. Lay and the Court having considered same is of the opinion that said Motion should be and is hereby Granted and that the Estate of Kenneth L. Lay is Substituted for the deceased Defendant Kenneth L. Lay:

SIGNED AND ENTERED at Houston, Texas on this the 10th day of August___, 2006.

/s/ Sim Lake
HONORABLE SIM LAKE
UNITED STATES DISTRICT JUDGE

18 U.S.C. § 3771. Crime victims' rights

(a) Rights of crime victims. – A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded. –

(1) In general. – In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall

make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings. –

(A) In general. – In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement. –

(i) In general. – These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims. – In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation. – This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. – For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights. –

(1) Government. – Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. – The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. – Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations. –

(1) Rights. – The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims. – In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. – The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which

the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. – In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief. – In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if –

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action. – Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. – For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance. –

(1) Regulations. – Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. – The regulations promulgated under paragraph (1) shall –

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

CREDIT(S)

(Added Pub.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 2261, and amended Pub.L. 109-248, Title II, § 212, July 27, 2006, 120 Stat. 616.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2004 Acts. House Report No. 108-711, see 2004 U.S. Code Cong. and Adm. News, p. 2284.

2006 Acts. Statement by President, see 2006 U.S. Code Cong. and Adm. News, p. S35.

References in Text

The Federal Rules of Appellate Procedure, referred to in subsec. (d)(3), are set out in the Appendix to Title 28.

The date of enactment of this chapter, referred to in subsec. (f)(1), is the date of enactment of Pub.L. 108-405, which was approved Oct. 30, 2004.

Amendments

2006 Amendments. Subsec. (b)(1). Pub.L. 109-248, § 212(1), struck out "In any court proceeding" and inserted "**(1) In general.** – In any court proceeding".

Subsec. (b)(2). Pub.L. 109-248, § 212(2), added par. (2).

Prior Provisions

Section, Acts June 25, 1948, c. 645, 62 Stat. 846; May 24, 1949, c. 139, § 59, 63 Stat. 98; May 10, 1950, c. 174, § 1, 64 Stat. 158; July 7, 1958, Pub.L. 85-508, § 12(k), 72 Stat. 348; Mar. 18, 1959, Pub.L. 86-3, § 14(g), 73 Stat. 11; Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a)(2), 82 Stat. 1115, relating to criminal procedure, including verdicts, was repealed by Pub.L. 100-702, Title IV, § 404(a)(1), Nov. 19, 1988, 102 Stat. 4651 eff. Dec. 1, 1988, see Pub.L. 100-702, § 407, set out as a note under 28 U.S.C.A. § 2071.

Short Title

2004 Acts. Pub.L. 108-405, Title I, § 101, Oct. 30, 2004, 118 Stat. 2261, provided that: "This title [enacting this section and 42 U.S.C.A. §§ 10603d and 10603e, repealing 42 U.S.C.A. § 10606, and enacting provisions set out as a note under this section] may be cited as the 'Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act'."

Reports to Congress

Pub.L. 108-405, Title I, § 104(a), Oct. 30, 2004, 118 Stat. 2265, provided that: "Not later than 1 year after the date

of enactment of this Act [Oct. 30, 2004] and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code [18 U.S.C.A. § 3771 et seq.], is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached."

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

> **(1)** in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

CREDIT(S)

(Added Pub.L. 104-132, Title II, § 204(a), Apr. 24, 1996, 110 Stat. 1227, and amended Pub.L. 106-310, Div. B, Title XXXVI, § 3613(d), Oct. 17, 2000, 114 Stat. 1230.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, *see* 1996 U.S. Code Cong. and Adm. News, p. 924.

Amendments

2000 Amendments. Subsec. (c)(1)(A)(ii). Pub.L. 106-310, § 3613(d), inserted "or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a))," following "property under this title,".

Effective and Applicability Provisions

1996 Acts. Section to be effective, to the extent constitutionally permissible, for sentencing proceedings in cases in which the defendant is convicted on or after Apr. 24, 1996, *see* section 211 of Pub.L. 104-132, set out as a note under section 2248 of this title.

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(2)

No. 06-1074

Supreme Court, U.S.
FILED
MAR 05 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RUSSELL P. BUTLER,

Petitioner,

v.

UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CRIMINAL ACTION NO. H-04-25 (S-2),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ESTATE OF KENNETH L. LAY

JOHN H. RAY, III
F. TURNER BUFORD
ROPES & GRAY LLP
One International Place
Boston, MA 02110
(617) 951-7000

SAMUEL J. BUFFONE*
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005
(202) 508-4657

Counsel for Respondent Estate of Kenneth L. Lay

* *Counsel of Record*

207164

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the procedural right to "full and timely restitution *as provided in law*" afforded to statutory crime victims under the Crime Victims Rights Act, 18 U.S.C. § 3771, changed existing substantive law governing restitution.

2. Whether Butler may raise the procedural rights afforded to statutorily defined crime victims under the Crime Victims Rights Act without making a *prima facie* showing that he suffered a harm directly and proximately caused by the offense alleged in the indictment.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Estate of Kenneth L. Lay is not a corporation.

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STATEMENT OF THE CASE

After his conviction on May 25, 2006, Kenneth L. Lay retained appellate counsel to appeal his conviction. Before he could pursue his appeal and indeed, before he was even sentenced, Mr. Lay died of a heart attack on July 5, 2006. No presentence report was prepared at the time of his death, and none was ever filed with the District Court. Under the direction of his widow, the executrix of his estate, the Estate of Kenneth L. Lay moved in the District Court to substitute itself for Mr. Lay in order to file a motion to vacate his conviction and dismiss the indictment consistent with the longstanding federal doctrine of abatement. The Lay Estate filed such a motion on August 16, 2006. The United States did not dispute that controlling precedent required abatement but requested that the District Court defer ruling so that the Department of Justice could seek legislation to change existing abatement law to allow for potential restitution to crime victims after the death of a criminal defendant.

On September 15, 2006, Russell P. Butler, who had never before appeared in the proceeding, through his attorneys, filed a motion seeking an order of restitution. The motion was based on his claim that the Crime Victims Rights Act, 18 U.S.C. § 3771 ("CVRA"), had changed existing abatement law as it related to restitution and that accordingly the case should not be abated. The Lay Estate filed an opposition to Mr. Butler's motion, rebutting the claim that the CVRA granted any more than the procedural right to "restitution as provided in law" (the exact words of the statute), and noting that Mr. Butler had failed to make any evidentiary showing that he was a "crime victim" as defined in the statute and thus had no standing. Mr. Butler never submitted any evidence to the District Court to establish his statutory capacity as a crime victim.

On October 17, 2006, the District Court denied Mr. Butler's motion, following controlling precedent in the Fifth Circuit and the uniform consensus among all of the parties that the CVRA did not change existing law and that the Lay Estate was entitled to have the conviction vacated and the indictment dismissed, relief which the District Court granted. The District Court held that

> [s]ince the Fifth Circuit Court of Appeals has adopted the abatement rule, and since neither the United States nor Butler has raised any legal basis for denying the rule's application in this case, the court concludes that Lay's conviction must be vacated and that this action against him must be denied.

(Cert. Pet. at App. 16). The United States appealed, but subsequently filed an unopposed motion to withdraw its appeal, which the Fifth Circuit granted on January 24, 2007.

On October 26, 2007, Mr. Butler filed a petition for a writ of mandamus in the Fifth Circuit (a limited procedure provided to crime victims in the CVRA, § 3771(d)(3)), seeking a writ directing the District Court to order restitution (the "Mandamus Petition"). In support of the Mandamus Petition, Mr. Butler again claimed that the right to "full and timely restitution as provided in law" did not incorporate existing law, but changed it, thereby abrogating the Fifth Circuit's *en banc* decision in *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004), which held that restitution could not be ordered when the underlying conviction abated upon the death of the defendant prior to appeal.

Addressing for the first time his evidentiary burden to show standing, Mr. Butler attached to the Mandamus Petition

an unsworn document purporting to be a letter and bank statement from UBS Financial Services Inc. showing that he owned Enron shares. The letter, by its own terms, did not show the "original purchase price and date of the Enron Corporation stock" (Mandamus Pet., Ex. E at 1). On the basis of this document, Mr. Butler asked the Fifth Circuit to find that he was a "crime victim" as defined by the CVRA. The United States did not take a position on the Mandamus Petition.

On November 1, 2007, the Fifth Circuit denied the Mandamus Petition without addressing Mr. Butler's standing as a statutory crime victim under the CVRA. The Fifth Circuit held that "[w]e find nothing in the CVRA or other legislation, either express or implicit, that purports to exempt the provisions of that act from the venerable abatement doctrine" (Cert. Pet. at App. 2). Mr. Butler now petitions this Court for a writ of certiorari.

ARGUMENT

I. The Only Question Properly Presented To This Court – Whether The CVRA Changed Existing Law Concerning Restitution – Is Unworthy Of Certiorari.

The issues of the proper substantive scope of restitution or abatement in the now-dismissed case of *United States v. Lay*, and the continuing validity of *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004), are not properly before this Court and should not be addressed on this Petition. Those are issues that the United States elected not to pursue through a direct appeal of the abatement order entered by the District Court. This mandamus proceeding, *Butler v. United States District Court for the Southern District of Texas*, is limited

to the scope of the Crime Victims Rights Act, 18 U.S.C. § 3771, and the rights enumerated therein, which are the only rights Petitioner, a self-proclaimed crime victim, could potentially raise if he had standing to assert them.

A. The CVRA Did Not Change Existing Law.

Throughout the proceedings below, Petitioner has claimed that the CVRA changed the law with respect to restitution, and created new substantive rights to restitution and, in particular, a continuing right to restitution following the death of a criminal defendant prior to his ability to prosecute an appeal of his conviction.

Petitioner's position is clear on the record. In his "Issues Presented" statement to the Fifth Circuit, Petitioner stated: "The District Court committed legal error of law by failing to consider and apply the Crime Victims Rights Act guaranteeing fairness to the crime victims resulting in the Court refusing to order statutorily mandated restitution . . . ." (Mandamus Pet. at 7-8).[1] In the Mandamus Petition, Petitioner argued that "Congress's passage of the Crime Victims Rights Act . . . clarifies that mandatory restitution pursuant to the Mandatory Victims Restitution Act is indeed mandatory thus clarifying a split amongst the circuits" (Mandamus Pet. at 11) and that "the recently enacted CVRA codified in 18 U.S.C. § 3771 overcomes the common law doctrine of abatement in so far as it vacates a victim's right to restitution" (Mandamus Pet. at 13).

The Fifth Circuit resolved those issues with little difficulty:

> The district court's order was grounded in the doctrine of abatement, as most recently recognized

1. Petitioner claimed in the District Court that "[t]he CVRA calls in [*sic*] question existing case law thus requiring courts to reconsider prior decisions which did not adequately consider the property interests of crime victims" (Mem. In Supp. of Victim's Mot. Opposing Mot. of the Estate of Lay at 6).

> for this circuit in *United States of America v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004) (en banc). We decline to issue a writ of mandamus.
>
> That our en banc decision in *Parsons* predated the CVRA is of no import. We find nothing in the CVRA or other legislation, either express or implicit, that purports to exempt the provisions of that act from the venerable abatement doctrine. The CVRA provides only that a crime victim is entitled to "full and timely restitution *as provided in law*."

(Cert. Pet. at App. 2) (emphasis in original).

Petitioner has presented the same question to this Court – whether the CVRA changed existing law governing restitution in the abatement context (Cert. Pet. at *i* (Question Presented No. 1)) – and the Court may answer it with similar ease. In enacting the CVRA, Congress did not alter or enlarge the then-existing law governing restitution. The use of the phrase "as provided in law" to modify the "restitution" promised by the CVRA makes this perfectly clear – as does the CVRA's legislative history. H. R. Rep. No. 108-711, at 10-11 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 2274, 2283 (This section ... *makes no changes in the law* with respect to victim's ability to get restitution." (emphasis added)).

This Court has held that to change existing law, Congress must make its intent specific, and cannot be presumed to have done so *sub silentio*. *Midlantic Nat'l. Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). But Petitioner can point to no authority to show that Congress intended to change existing law through the CVRA.[2]

---

2. Existing law in at least two federal circuits provided for abatement of a restitution order along with a conviction at the time the CVRA was enacted. *Parsons*, 367 F.3d. 409; *United States v. Logal*, 106 F.3d 1547 (10th Cir. 1997). Congress could have, but did (Cont'd)

Indeed, the CVRA does not support the proposition that the estate of a defendant whose conviction has been vacated, by reason of death, should nonetheless pay restitution. Congress' silence is significant, particularly since Petitioner's interpretation of the CVRA would place it in conflict with the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, which provides for restitution only "when sentencing a defendant *convicted* of an offense." (emphasis added). In addition, the CVRA does not articulate a new standard for courts to apply to the determination of restitution. Instead, the CVRA explicitly incorporates by reference existing, substantive restitution law. 18 U.S.C. § 3771(a)(6) (affording restitution "as provided in law"). It is clear therefore that the CVRA did not change existing law and that Petitioner is not entitled to restitution because the underlying conviction abated as required by controlling circuit precedent.[3]

(Cont'd)
not, change the existing law. Further supporting the conclusion that the CVRA did not change existing law, in the proceedings below, the United States Department of Justice rejected Petitioner's arguments and instead drafted proposed legislation that it claimed was a necessary change of existing law. Petitioner himself submitted evidence to the Fifth Circuit (improperly) from United States Senator Diane Feinstein that she "plan[ned] to introduce legislation . . . to address the issue of abatement after a criminal defendant's death," and urged the United States to appeal to preserve potential restitution for supposed crime victims. (Mandamus Pet., Ex. F at 1-2).

3. Petitioner's Due Process and Takings arguments are therefore frivolous because he had no protected property interest in restitution against a defendant whose conviction was vacated by operation of abatement. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'"); *Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("The Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests.").

B. Crime Victims Do Not Have the Right To Challenge The Propriety of an Order Setting Aside a Criminal Conviction Under the CVRA.

The facial language and overall structure of the CVRA compels the conclusion that Congress did not intend for the CVRA and its expedited mandamus provisions to be used by crime victims to challenge substantive questions of law as Petitioner seeks to do in this case by challenging the abatement doctrine as confirmed in *Parsons*. Under the CVRA, crime victims are not given a right of direct appeal to enforce the enumerated rights afforded them in § 3771(a) of the statute. 18 U.S.C. § 3771(d)(4) ("In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). To protect their rights, Congress only provided crime victims a limited mechanism to petition the Courts of Appeals for a writ of mandamus. § 3771(d)(3).

Traditionally, a writ of mandamus has been considered a "drastic and extraordinary remedy" appropriate only in situations involving a "judicial usurpation of power or a clear abuse of discretion." *See, e.g., Cheney v. U.S. Dist. Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Congress was aware of that history and it informs the scope of mandamus afforded crime victims under the CVRA.

The expedited timetable prescribed by the CVRA is a further indication that its mandamus provisions are limited to discrete procedural questions – not substantive issues of law or challenges to the propriety of orders setting aside criminal convictions. Under the CVRA, a Court of Appeals is obliged to "take up and decide [an] application [for a writ of mandamus] forthwith *within 72 hours after the petition*

has been filed." 18 U.S.C. § 3771(d)(3) (emphasis added). The CVRA provides that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." *Id.*

In interpreting the scope of the mandamus procedure crafted by Congress, the CVRA cannot be read to allow crime victims to challenge anything more than whether they received the procedural rights afforded by the statute. The right to "full and timely restitution as provided in law" therefore must be limited to the procedures employed by the district court in determining the scope of and entitlement to restitution during a sentencing of a criminal defendant.

Any more expansive reading is simply inconsistent with the purpose of the statute. For example, in this case, Petitioner claims that he has the right to challenge the law on abatement because it effectively denied him restitution. Accepting this proposition requires the Court to accept that almost any substantive question of law that might preclude restitution could equally be brought up on mandamus under the CVRA.

Consider, for example, a case where instead of vacating the conviction because of abatement, the district court vacates a conviction pursuant to Federal Rule of Criminal Procedure 29 and grants a judgment of acquittal following a guilty verdict. Under Petitioner's theory, while the United States could seek an appeal, he could nonetheless seek a writ of mandamus, challenging the underlying Rule 29 decision under the theory that the judgment of acquittal precluded full and timely restitution. The Court of Appeals would have to review the entire trial record and reach a conclusion, in a written opinion, within 72 hours, thereby preempting a full appeal by the United States.

Moreover, under Petitioner's theory, any denial or limitation of restitution is inconsistent with the CVRA, and every crime victim can seek a writ of mandamus under the CVRA's expedited procedures to challenge the calculation of restitution or any finding that has the effect of limiting or denying restitution. Such actions would force the Courts of Appeals to decide complex questions normally resolved through the direct appeal process in expedited CVRA mandamus proceedings. There can be no question that Congress did not have this in mind, and that the CVRA does not provide for this type of review in its limited mandamus provisions.

The scope of the right to "full and timely restitution as provided in law," must be understood within the broader context of the CVRA – a statute whose overarching purpose was to ensure the participation of crime victims in the criminal process. *See, e.g.*, 18 U.S.C. § 3771(a)(2) (affording the "right to reasonable, accurate, and timely notice of any public court proceeding"); § 3771(a)(4) (affording the "right to be reasonably heard at any public proceeding in the district court"); § 3771(a)(5) (affording the "reasonable right to confer with the attorney for the Government in the case"); *see also* H. R. Rep. No. 108-711, at 3, *as reprinted in* 2005 U.S.C.C.A.N. 2274, 2276 ("Victims of crime often *do not feel their voices are heard or that their concerns are adequately addressed in the judicial process*." (emphasis added)).[4] The right to full and timely restitution, understood in the context of these other rights, is limited. The CVRA

4. It should be pointed out that Mr. Butler (to the extent he is a victim), along with other Enron shareholders, is not without a remedy. Civil lawsuits have been filed and settled for substantial sums to compensate shareholders. *See* Tom Fowler, *Cooperation could pay off for Fastow*, HOUSTON CHRONICLE, Sept. 26, 2006 *available at* http://www.houstonchronicle.com /CS/CDA/ printstory.mpl /front/4214118 (noting that shareholders have negotiated approximately $7.3 billion in settlement with various parties).

did not change the law nor provide crime victims the right to challenge the law, only the right to have the law applied.

C. Certiorari is Unwarranted in this Case.

Because the question presented by Petitioner is straightforward, this is not a case worthy of certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). There is no circuit split on the CVRA question presented – no court has held that the CVRA changed any underlying substantive law concerning restitution or abatement.[5]

The majority position and recent trend in the federal courts endorses the abatement of restitution orders. *See*, *supra*, note 5. There is simply no reason for this Court to address the limited question presented since Petitioner has not even made a colorable argument that the CVRA changed the law surrounding restitution as drastically as he proposes.

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5. The split that Petitioner suggests as to the substantive question of abatement of restitution on the death of the defendant before appeal is not as compelling (or favorable) as he suggests. *United States v. Cloud*, 921 F.2d 225 (9th Cir. 1990) was not an abatement case; indeed, the defendant himself prosecuted that appeal, his second after the court had already affirmed his conviction. *United States v. Asset*, 990 F.2d 208 (5th Cir. 1993) was overruled by *Parsons*, and nonetheless only addressed voluntary restitution already paid by a defendant pursuant to a plea agreement. *United States v. Christopher*, 273 F.3d 294 (3rd Cir. 2001), relied on *United States v. Mmahat*, 106 F.3d 89 (5th Cir. 1997), which was overruled by *Parsons*, calling into question whether *Christopher* is still good law. *United States v. Dudley*, 739 F.2d 175 (4th Cir. 1984) was decided prior to *Parsons* and *United States v. Logal*, 106 F.3d 1547 (10th Cir. 1997). The Eleventh Circuit recently clarified that its precedent required abatement of restitution. *United States v. Koblan*, No. 05-13038, 2007 WL 474953 (11th Cir. Feb. 15, 2007). Abatement of restitution is the majority position and has been the recent trend in federal courts.

II. Petitioner Has Made No Evidentiary Showing That He Is A "Crime Victim" Under The CVRA And Therefore Lacks Standing.

Petitioner has offered no basis to assert the rights of a crime victim as defined in the CVRA. Petitioner failed to submit any evidence to the District Court establishing his standing, but simply claimed that he owned Enron shares that lost value. In the Fifth Circuit, for the first time, Petitioner attached an unsworn document purporting to be a letter and statement from UBS Financial Services Inc. allegedly showing that he owned Enron shares that lost value, but also stating "[r]egrettably, UBS Financial Services does not have the information pertaining to the original purchase price and date of the Enron Corporation Stock. . . ." (Mandamus Pet., Ex. E at 1). This so-called "evidence" was improperly submitted to the Fifth Circuit, *see Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999), and does not come close to even a minimal showing that Petitioner was "directly and proximately harmed as a result of the commission of a federal offense," as required by 18 U.S.C. § 3771(e).

Petitioner has made no effort to connect any loss he supposedly suffered directly and proximately to the allegations concerning the criminal offenses in the now-dismissed indictment. Neither the District Court nor the Fifth Circuit has ever made any such determination or recognized Petitioner as a crime victim, instead rejecting his arguments on the merits. Petitioner has no standing to assert any rights under the CVRA, and his petition must be dismissed.

CONCLUSION

For all of the foregoing reasons, Respondent Estate of Kenneth L. Lay respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

SAMUEL J. BUFFONE*
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005
(202) 508-4657

JOHN H. RAY, III
F. TURNER BUFORD
ROPES & GRAY LLP
One International Place
Boston, MA 02110
(617) 951-7000

Counsel for Respondent Estate of Kenneth L. Lay

* *Counsel of Record*